IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-482

STATE OF MICHIGAN,
Petitioner,

v.

THOMAS W. TUCKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of California has a special interest in the present case. Any extension of categories of issues cognizable by way of federal habeas corpus (28 U.S.C. § 2241) presents problems of vital concern to each state. The primary responsibility for the enforcement of the criminal justice process in this country resides in the states. The erosion of finality of state court criminal convictions through the use of federal collateral

remedies has both subverted the original purpose of the federal writ of habeas corpus as well as minimized society's interest in the finality of criminal judgments.

If, as contended by petitioner and fully supported by the State of California, the standards of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.2d 974 (1966), are too restrictive in excluding admissions and are not mandated by the United States Constitution then federal collateral attacks on such final state court judgments should not be permitted.

Where, as in this case, the substantive merits of the issues raised have been fully and fairly litigated in the state courts, the undue extension of *Miranda* requirements by the federal courts is an unwarranted use of the writ of habeas corpus. The *Miranda* issue does not bear upon the integrity of the fact-finding process. To require police officers to comply with the specifics of an opinion (*Miranda*) at a time prior to the opinion's issuance and when compliance with the then existing law was had (*Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)), merely exacerbates the problem of federal-state relationships. It seeks to impose upon the states through the use of a collateral remedy a stricter standard for the admission of statements than Congress has now established for confessions under the federal justice system (Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(b)).

The State of California joins the State of Michigan in urging that this Court reconsider the effective date of *Miranda,* limit any expansion of its doctrines and further hold that the doctrine is not constitutionally compelled so as to permit recourse to federal habeas corpus for collateral attacks on final state court judgments on such grounds.

ARGUMENT

I. The Miranda Doctrines Should Not Be Extended to Encompass Voluntary Statements Meeting Legal Requirements at the Time of the Occurrence.

A. The Dicta of Johnson v. New Jersey, 384 U.S. 719 (1966), Should Not Require the Application of Miranda v. Arizona, 384 U.S. 436 (1966), to this case.

In *Johnson* v. *New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), decided one week after the *Miranda* decision, *supra,* this Court held that *Miranda* should not be applied retroactively. In the *Johnson* case, however, the questioning and the trial occurred several years prior to *Miranda.* Most of the states and lower federal courts have purported to follow the dicta of *Johnson* and applied *Miranda* to situations occurring prior to *Miranda* but where the trial date was subsequent to *Miranda.*[1] Such a result ignores the criteria previously used by this Court in determining the retroactivity issue: (a) the purpose to be served

[1] Pre-*Miranda* confession—post-*Miranda* trial—*Miranda* requirements applied: *United States* v. *Vanterpool,* 394 F.2d 697, 699–700 (2d Cir. 1968); *United States* v. *Fox,* 403 F.2d 97, 100 (2d Cir. 1968); *United States* v. *Chaplin,* 435 F.2d 320, 322 (2d Cir. 1970); *Griffith* v. *Jones,* 283 F.Supp. 794 (N.D. Ga. 1967); *Evans* v. *United States,* 375 F.2d 355 (9th Cir. 1967); *Groshart* v. *United States,* 392 F.2d 172, 175 (9th Cir.

by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. First among these factors is the purpose to be served by the new constitutional rule (See *Williams* v. *United States,* 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), holding *Chimel* v. *California,* 395 U.S. 752 (1969), *applicable to searches conducted after* the date of *Chimel; Desist* v. *United States,* 394 U.S. 244, 253 (1969), holding *Katz* v. *United States,* 389 U.S. 347 (1967), *applicable to wiretaps occurring after Katz; Stovall* v. *Denno,* 388 U.S. 293, 300–301 (1967) holding *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), *applicable to cases where the confrontations occurred after* the decisions in these cases). To the same effect was *Morrissey* v. *Brewer,* 408 U.S. 471, 490, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, 666 (1973), where the court limited the new requirements as to due process in parole procedures to situations arising after the dates of those decisions.

The application of an occurrence-date of prospectivity in the case at bar would eliminate the necessity

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1968); *People* v. *Welborn,* 2 Cal.App.3d 715, 82 Cal.Rptr. 845 (1969); *Young* v. *State,* 234 So.2d 341 (Fla. 1970); *State* v. *Anderson,* 229 So.2d 329 (La. 1969); *Commonwealth* v. *Bujnowski,* 267 N.E.2d 924 (Mass. App. 1971); *People* v. *Kilduff,* 276 N.Y.S.2d 814, 816 (1966); *Commonwealth* v. *Yount,* 435 Pa. 276, 279 (1969); *People* v. *Schader,* 71 Cal.2d 761, 80 Cal.Rptr. 1, 457 P.2d 841 (1969); *People* v. *Rollins,* 65 Cal.2d 681, 56 Cal.Rptr. 295, 423 P.2d 221 (1967).

of police officers having the necessary prescience to anticipate opinions of this Court. It would minimize the strain on federal-state relations now occasioned by the overruling of state court decisions by federal courts for failure of the police to apply later developed standards when at the time of the occurrence they had acted in good faith on the law then in effect. The adoption of such a rule of prospectivity would not undermine the purposes of *Escobedo* and *Miranda*. Those decisions were directed at future police practices and any past misconduct could not be cured by setting free prisoners who have committed heinous crimes but who fortuitously would become entitled to their release not on the ground of innocence but because the police could not foresee later developed technical requirements.[1a]

Here at the time of the taking of the statements, the law enforcement officials relied upon the *Escobedo* requirements and advised respondent of his right to counsel and to the privilege against self-incrimination. His basic constitutional rights were protected. It does not appear that the fact that he was not advised of his rights as to court appointed counsel if he were indigent would make his statements in any manner involuntary. It is apparent that if the occurrence had taken place subsequent to *Miranda* the officers would have known and therefore complied with its requirements. To apply *Miranda* requirements to a case

[1a] *United States* v. *Calandra*, 42 U.S.L.W. 4104 (1974).

where the officers could not have known of its requirements when they sought to ascertain the respondent's connection with the offense and where they merely learned the name of the person he considered his "alibi" witness can hardly be considered as compelling him contrary to his volition to convict himself.

The retroactive application of *Miranda* requirements to the factual situation here presented would in fact glorify form over substance and obviously disrupt the administration of criminal justice. Such an extended application of the *Miranda* rule which does not deal with the integrity of the truth determining process tends to create disrespect for the law by the police, lawyers,[2] lawmakers,[3] and all involved in the criminal justice process.

Amicus curiae therefore urges that this Court limit the applicability of *Miranda* requirements to occurrences subsequent to the date of that decision in accordance with the rationale of the decision itself and the reasons for not applying it to retrials found in *Jenkins* v. *Delaware,* 395 U.S. 213, n. 7, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969).

B. The Application by the Federal Courts of a Stricter Standard for Admissibility of Statements of a Respondent Than Congress Has Required for the Admissibility of Confessions in Federal Courts Is Not Mandated by the Federal Constitution.

In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court held that no confession, admission or exculpa-

[2] Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L. Rev. 631, 645 (1967).
Schwartz, *Retroactivity, Reliability and Due Process,* 33 U. Chi.L. Rev. 719, 764 (1966).

[3] Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501; P.L. 90-351, Title II, 82 Stats. 210.

tory statement could be introduced into evidence at any trial unless certain detailed warnings were given and waivers obtained in accordance with the opinion's requirements.

Subsequently thereto Congress enacted the Omnibus Crime Control and Safe Streets Act, effective June 19, 1968. In section 3501 of Title 18: (P.L. 90-351, Title II, 82 Stats. 210), it is provided:

"ADMISSIBILITY OF CONFESSIONS

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such

defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

. . . . .

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

Admittedly, this legislation by its very terms applies only to federal prosecutions. Nevertheless, it recognizes that *Miranda* in terms of the specific requirements therein set forth is not constitutionally compelled. (See 1968 U.S. Code Cong. and Ad. News, pp. 2112, 2123–2138).

In *Miranda,* itself, this Court stated (384 U.S. at 467):

". . . [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."

In the instant case it is apparent that the statement in which the lead was given to the witness whose tes-

timony was sought to be suppressed met the requirements of what Congress felt to be the governing factors of a voluntary statement. Here, the respondent was advised of his rights to counsel as well as his privilege against self-incrimination. Save and apart from failure to advise him as to the appointment of counsel if he were indigent his statements would clearly have been voluntary in the traditional sense.

The *Miranda* ruling has led to a multitude of cases presenting questions of law not related to true voluntariness of a confession or admission by reason of hypertechnical questions of interpretation. As is readily apparent courts have been loath to turn loose upon society those individuals who were accorded full due process rights save for the fortuitous circumstances that their cases were tried subsequent to *Miranda* and all specifics were not found in the records.

Where Congress has recognized society's interest in the ascertainment of the truth and has balanced society's interests against that of the individual it is apparent that any expansion of *Miranda* is not alone unwarranted but contrary to Congressional intent, particularly where it is applied to a final state court judgment subjected to a collateral attack in federal courts.

II. Federal Habeas Corpus Should Not Be Permitted to Review Final State Court Criminal Convictions Based on Alleged Violations of Miranda v. Arizona, 384 U.S. 436, Supra, or Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In the recent case of *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), this Court upheld a consent search against a collateral attack in the federal courts and found that the consent was voluntary and the standard used by the state court in reaching this determination, the totality of circumstances, was proper. One of the questions also raised in the case was the use of federal habeas corpus to review final state court judgments on questions involving search and seizure. Mr. Justice Powell in a concurring opinion joined in by the Chief Justice and Mr. Justice Rehnquist discussed and rejected the use of federal habeas corpus to review Fourth Amendment claims. Mr. Justice Powell concluded with language which is directly apposite to the present case (412 U.S. 218 at 275):

> " . . . Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for reexamination is not even that the convicted defendant was innocent. There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the

end weaken rather than strengthen the writ's vitality."

The same reasoning is applicable to review of *Miranda* contentions which do not have as their primary purpose the protection of either the reliability of the fact-finding process at the trial or on appeal from the judgment of conviction.

Although *Miranda* guards against the possibility of unreliable statements in every instance of in-custody interrogation it encompasses situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. (*Johnson* v. *New Jersey*, 384 U.S. 719, 729–730, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).) Patently the situation presented in the case at bar where merely the name of a witness was obtained from the statement of the respondent at a time when the police conduct would not have been illegal, the application of the *Miranda* and *Wong Sun* doctrines to such procedure is an undue expansion of the two doctrines.

To avoid the result reached by the district and circuit courts in this case other state and federal courts have used several methods. Some courts have distinguished between the discovery of evidentiary material and the discovery of the identity of witnesses;[4] other

[4] Witnesses Testimony Not Suppressed: *State* v. *Johnson*, 192 N.W. 2d 87 (Minn. 1971); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963), *cert. den.* 377 U.S. 954; *Brown* v. *United States*, 375 F.2d 310 (D.C. Cir. 1967); *Pfeifer* v. *State*, 460 P.2d 125 (Okla. Cr. 1969). Contrary: *Williams* v. *United States*, 382 F.2d 48 (5th Cir. 1967); *United States* v. *Tane*, 329 F.2d 848, 853 (2d Cir. 1964); *Goodman* v. *United States*, 285 F.Supp. 245 (C.D. Cal. 1968); *Commonwealth* v. *Cephas*, 447 Pa. 500, 291 A.2d 106 (1972).

courts by somewhat strained construction have found that the results would have been reached otherwise, i.e., by the voluntary action of the witness whose identity was disclosed;[5] still other courts have held that in the normal course of police investigation the identity of the witness would have been discovered;[6] and still other courts have found an attenuation of the taint by time, warnings, change of position of the witness or some other reason such as the defendant not being in custody at the time of the interrogation so as to require *Miranda* warnings.[7] Obviously the courts have balanced the need for the protection of society with the need to deter illegal police activity and where the balance is on the side of society have found reasons for refusing to apply the *Miranda* and *Wong Sun* doctrines.

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[5] *United States* v. *Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967); *United States* v. *Evans*, 454 F.2d 813, 818 (8th Cir. 1972).

[6] *United States v. Holsey*, 437 F.2d 250, 253 (10th Cir. 1970); *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973); *People* v. *Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139 (1973); *Lockridge* v. *Superior Court*, 3 Cal.3d 166, 89 Cal.Rptr. 731, 474 P.2d 683 (1970); R. Maguire, *How to Unpoison The Fruit, The Fourth Amendment And The Exclusionary Rule* (1964) 55 J. Crim. L. C & P.S. 307, 314–317.

[7] *Johnson* v. *State*, 496 S.W.2d 72 (1973); *People* v. *Pettis*, 298 N.E.2d 372, 12 Ill.App.3d 123 (1973); *United States* v. *Workman*, 470 F.2d 151 (4th Cir. 1972); *People* v. *Carter*, 204 N.W.2d 703, 43 Mich. App. 735 (1972); *United States* v. *Brandon*, 467 F.2d 1008 (9th Cir. 1972); *United States* v. *Tyler*, 459 F.2d 647 (10th Cir. 1972); *United States* v. *Evans*, 454 F.2d 813 (8th Cir. 1972); *People* v. *Gill*, 187 N.W.2d 707 (Mich. 1971); *State* v. *Miranda*, 104 Ariz. 174, 450 P.2d 364 (1969); *People* v. *McInnis*, 6 Cal.3d 821, 100 Cal.Rptr. 618, 494 P.2d 690 (1972); *People v. Welborn*, 2 Cal.App.3d 715, 82 Cal.Reptr. 845 (1969).

Where, as in this case, the federal courts have expanded these doctrines to encompass situations occurring prior to the decision in *Miranda* certainly the rationale for the rule—the deterrence of improper police practices—is not served. There is a scarcity of judicial resources. A repetition of hearings in federal courts in instances where a respondent has had a full and fair state hearing is a useless expenditure of judicial time, personnel, prosecutors and defense counsel. The encouraging of collateral attack frustrates the deterrent effect of the law and the effectiveness of rehabilitation. There is an undue subordination of state courts to lower federal courts with the resulting exacerbation of federal-state relationships and the doctrine of federalism is itself eroded. The guilt or innocence of the defendant or respondent is not in doubt. The situation presented is a question of compliance with technicalities upon which various courts have disagreed and the requiring of prescience on the part of law enforcement of requirements which will later be imposed under a future opinion.

These objections to the use of federal habeas corpus have been recognized by Judge Friendly in his article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142 (1970); Professor Bator in his article on *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harvard Law Review 441; Professor Doub in his article, *The Case Against Modern Federal Habeas*

Corpus, 57 A.B.A.J. 323, and in a recent article, Shapiro, *Federal Habeas Corpus: A Study in Massachusetts,* 87 Harvard Law Review 321 (1973). The conclusions of these commentators and judges supports the contentions of the amicus curiae herein. Since the exclusionary rules are not designed to insure the fairness of the trial but to discipline police officers, the impact of the rule on such discipline when utilized as the basis for collateral attack on a final judgment is certainly minimal. (Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi.L.Rev. 665 (1970).)

As Mr. Justice Powell further stated in his concurring opinion in *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 251:

> " . . . Neither the history or purpose of habeas corpus, the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims, nor any sound reason relevant to the administration of criminal justice in our federal system justifies such a power."

Amicus curiae submits that the action of the lower federal courts in the instant case erroneously expanded the application of the *Miranda* doctrine and arrived at a conclusion not compelled by the United States Constitution.[8] The further expansion of the use of federal habeas corpus with its concomitant burdens on

[8] Amicus curiae also joins with petitioner in Argument II of Brief of Petitioner.

the system of criminal justice should not be permitted particularly in a case such as the present one in which the respective respondent has received that "due process" to which he was entitled under the federal Constitution.

CONCLUSION

For the foregoing reasons, the State of California as amicus curiae on behalf of the petitioner herein, respectfully requests this Court to reverse the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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UNITED STATES CODE
28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

As amended May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

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